

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA) CAUSE NO. 3:04-CR-240-P
 (
vs.)
 (OCTOBER 28, 2008
) DALLAS, TEXAS
HOLY LAND FOUNDATION, ET AL (9:00 A.M.

VOLUME 26 OF 37

STATEMENT OF FACTS

BEFORE THE HONORABLE JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE
and a jury

A P P E A R A N C E S

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
1100 COMMERCE, 3RD FLOOR
DALLAS, TEXAS 75242
BY: MR. JIM JACKS
MR. BARRY JONAS
MS. ELIZABETH SHAPIRO

FOR THE DEFENDANT: FREEDMAN, BOYD, HOLLANDER,
(SHUKRI ABU BAKER) GOLDBERG & IVES, P.A.
20 FIRST PLAZA, SUITE 700
ALBUQUERQUE, NEW MEXICO 87102
BY: MS. NANCY HOLLANDER
MS. TERESA DUNCAN

1 FOR THE DEFENDANT: LAW OFFICE OF JOSHUA L. DRATEL
2 (MOHAMMAD EL-MEZAIN) 14 WALL STREET, 28TH FLOOR
3 NEW YORK, NEW YORK 10005
4 BY: MR. JOSHUA DRATEL
5 MR. AARON J. MYSLIWIEC

6 FOR THE DEFENDANT: LAW OFFICE OF MARLO P. CADEDDU
7 (MUFID ABDULQADER) 3232 MCKINNEY AVENUE, SUITE 700
8 DALLAS, TEXAS 75204
9 BY: MS. MARLO P. CADEDDU

10 FOR THE DEFENDANT: LAW OFFICE OF LINDA MORENO
11 (GHASSAN ELASHI) P.O. BOX 10985
12 TAMPA, FLORIDA 33679
13 BY: MS. LINDA MORENO

14 JONES DAY
15 555 CALIFORNIA ST., 26TH FLOOR
16 SAN FRANCISCO, CA 94104
17 BY: MR. JOHN D. CLINE

18 FOR THE DEFENDANT: WESTFALL, PLATT & CUTRER
19 (ABDULRAHAM ODEH) ONE SUMMIT AVENUE, SUITE 910
20 FORT WORTH, TEXAS 76102
21 BY: MR. GREG WESTFALL

22 COURT'S LAW CLERK: MS. JENNIFER HELMS
23 1100 COMMERCE, RM. 1654
24 DALLAS, TEXAS 75242

25 COURT COORDINATOR: MS. BRENDA WEBB
 1100 COMMERCE, RM. 1654
 DALLAS, TEXAS 75242

 OFFICIAL COURT REPORTER: SHAWN M. McROBERTS, RMR, CRR
 1100 COMMERCE STREET, RM. 1654
 DALLAS, TEXAS 75242
 (214) 753-2349

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1 THE COURT: Good morning.

2 All right. We will start with the -- I know Ms. Moreno
3 is not here. We will let the record reflect that she is ill.

4 MS. DUNCAN: I spoke to her this morning and she
5 expressed her regrets, but she is extremely ill.

6 THE COURT: She left a voicemail and I heard her
7 voice. She is pretty bad. I hope she is well by tomorrow.

8 One of the things to be thinking about as well, too, is I
9 was thinking about maybe working Friday since we are out
10 today. Now, we called off some of the jurors this morning.
11 As soon as we found out, we started calling them, Brenda did,
12 and some of them had plans on Friday. They were going to look
13 to see what they could do. So it is iffy. And of course the
14 Marshal needs to know. So we will let everybody know tomorrow
15 about your plans for Friday.

16 MS. CADEDDU: I am not sure because the Court I
17 don't think has little children, but Friday is actually
18 Halloween.

19 THE COURT: I was aware, yes.

20 MS. CADEDDU: It is a big deal around the Cadeddu
21 house. Maybe we can work in the morning and take the
22 afternoon off as sort of a compromise, if the jurors are even
23 available to do that. That way we can do the Halloween
24 festivities.

25 THE COURT: Mr. Dratel?

1 MR. DRATEL: Can we go off the record?

2 THE COURT: Sure.

3 (Discussion held of the record.)

4 MS. SHAPIRO: Just a scheduling issue. The strong
5 preference of I think the witness is to not have to stay
6 through a weekend, but to finish this week, and I think today
7 sort of throws that into doubt.

8 And the other problem is that Friday, because we are off
9 and we expected him to be finished as well, he has something
10 else scheduled in another part of the country on Friday. He
11 is willing -- they can rearrange that if we can be in court
12 Friday and he can finish. If we are not going to be in Court
13 Friday and he has to be back on Monday, then he would like to
14 be able to keep that meeting on Friday, which means that he
15 would have to -- We would have to finish court Thursday by
16 3:00 so he could get out.

17 So I know it is all very complicated, but I guess -- If
18 we are not having court on Friday, then our requests would be
19 that we end at 3:00 so that he could get to his commitment.

20 THE COURT: He needs to finish by 3:00 Thursday, and
21 if we don't do that then he would rather not work Friday and
22 be back Monday. Is that what I am hearing?

23 MS. SHAPIRO: Right. Preferably if we could finish
24 this week, he is willing to cancel everything to have it all
25 done by Friday. But if we know for sure that it is not going

1 to happen and he is going to have to be here Monday anyway --

2 THE COURT: Then he wants to leave at 3:00.

3 MS. HOLLANDER: Just to add to the complications.

4 THE COURT: We needed some more complication.

5 MS. HOLLANDER: One of our experts is only available
6 Monday. He was available this Wednesday. Is that today or
7 tomorrow? Tomorrow. But we found out the Government wasn't
8 going to be finished, so we gave him that day back, and the
9 only other day we have him is Monday.

10 THE COURT: Which expert is that?

11 MS. HOLLANDER: Doctor Esposito.

12 THE COURT: And we will get to those motions in
13 limine.

14 How much longer do you have on direct?

15 MS. SHAPIRO: Well, I was hoping to be done by the
16 end of today with direct. Basically I need to cover each
17 committee and that is what we are starting to get to now.

18 Gauging by last year, it was I think a day and a little
19 bit, so since we already sort of covered a little bit, it
20 could be by the end of the day on direct, so I would hope by
21 the end of the day tomorrow. If I were really optimistic, I
22 would say by the last break, but to be safe I would say I need
23 a whole day.

24 THE COURT: How long did cross take the last time?
25 Do you all remember?

1 MR. DRATEL: This is obviously all dependent on how
2 different tomorrow is than it was the last time. I don't
3 know. But I am thinking that if we start cross tomorrow, we
4 could finish by 3:00 on Thursday. It is conceivable. I am
5 not saying that it is absolute. But the cross last year -- my
6 recollection is that it was -- and it went over a period of
7 two days because it started in the afternoon, but I think it
8 went at least the balance of one afternoon, and it was about a
9 day I think. Is that right? I am including recross. I am
10 saying from the moment we started cross to the moment he got
11 off, about a day.

12 MS. HOLLANDER: It wasn't even a whole day, because
13 that second day something else happened.

14 THE COURT: It sound likes we could finish him
15 Friday.

16 MS. SHAPIRO: We could if we worked Friday,
17 absolutely. The issue is if we don't work Friday or we work
18 half a day Friday.

19 THE COURT: But if they can finish by Thursday
20 afternoon, your redirect shouldn't be too much longer. We may
21 not need but half a day to wrap it up by the time Friday, if
22 we could finish the cross by Thursday.

23 MR. DRATEL: It is conceivable.

24 THE COURT: And then we will just have to go from
25 there. You will have to be a little late to your Halloween

1 festivities.

2 MS. CADEDDU: They have a parade at my child's
3 school at 2:00. That will be the goal.

4 MR. DRATEL: And maybe we will get together in terms
5 of counsel may come up with a proposal, perhaps, if tomorrow
6 we work a little later, I don't know about -- how given
7 everybody's different schedules, but perhaps if we put in a
8 half hour additional or perhaps more, we would know more about
9 our ability to finish Thursday.

10 I mean, obviously if the Government doesn't get to finish
11 tomorrow, for whatever reason, then it is going to be hard to
12 finish Thursday. But if we do start cross tomorrow, perhaps
13 if we get into it --

14 THE COURT: We could spend an extra hour tomorrow
15 and Thursday. That may help us as far as Friday. We will see
16 where we are, then, how soon you are able to finish up your
17 direct. So we will get started, and then we can just decide
18 as we get on into Thursday afternoon, or maybe even by
19 Thursday morning we may know depending on where everything is.

20 All right. And at this point is the Government
21 anticipating additional witnesses after Avi?

22 MR. JONAS: Your Honor, we received notice from
23 Ms. Hollander that she anticipates trying to move into
24 evidence certain exhibits relating to USAID through Avi. We
25 are going to object to that and file objections. We don't

1 think he is a proper witness for that.

2 If Your Honor admits those exhibits, then we will be
3 calling a witness from USAID. He will not be a very lengthy
4 witness at all. I just need to know and figure out--he is in
5 Washington is where USAID is based--whether or not I should
6 have him here Friday, or whether I should tell him to be here
7 Monday.

8 THE COURT: When are you getting the objections to
9 these exhibits?

10 MR. JONAS: I just received the email. I don't know
11 when Ms. Hollander sent it --

12 MS. HOLLANDER: I sent it last night.

13 THE COURT: It was late last night.

14 MS. HOLLANDER: It was fairly late last night, yes
15 it was.

16 THE COURT: Maybe 10:00 or so. Maybe 8:00.

17 MR. JONAS: We will have our objections to you by
18 the end of the day today. And they all seem to be one
19 category, so it should be fairly simple to object.

20 MS. HOLLANDER: They were the same ones that were
21 introduced last year.

22 THE COURT: We will take those objections an rule on
23 those in the morning and you will know by then. So be there
24 at 8:30 in the morning and I will give you a ruing on those.
25 And if we get your objections in early enough this afternoon,

1 I may be able to give you a ruling this afternoon. It just
2 depends on when you are able to get your objections in.

3 The 106 issue, is that your issue, Ms. Duncan.

4 MS. DUNCAN: It is actually Ms. Moreno's issue.

5 THE COURT: We will take that one up in the morning.

6 Have you looked at that? Are you going to object to
7 that?

8 MS. SHAPIRO: Yes. I mean, what we got was the
9 excerpts. We didn't get an explanation of how it explains or
10 relates --

11 THE COURT: We will address that in the morning. I
12 don't want to do it now. I just wanted to know whether you
13 were going to object or not, and you are, so we will take that
14 up at 8:30 in the morning as well.

15 Let's get to the motions in limine, then. Beginning with
16 Doctor McDonald, do you want to address that.

17 MS. CADEDDU: Yes, I can. I will try to address --
18 I was hoping to be able to get the Court a written response,
19 but I haven't had a chance.

20 I guess there are three issues. One is the notice that
21 he would be called. Another is the sufficiency of the notice
22 about what he would be testifying to. And another is
23 relevance. If I have mischaracterized it, I am sure the
24 Government will correct me.

25 As far as notice about whether he would be called, we

1 complied with the Court's deadline and gave notice on July 8th
2 or 9th, whenever it was, that we intended to call him,
3 although we let the Government know we were having funding
4 issues, as the Court will recall. So we said, you know, we
5 haven't been able to give him any materials to review because
6 we haven't been able to officially retain him, but I
7 anticipate that he will cover these areas based upon his
8 education and training and his review of the exhibits.

9 Subsequent to that, as the Court will recall, the Fifth
10 Circuit approved funding him so we were able to retain him,
11 and in August I provided a supplemental notice and I think
12 those are both attached to the Government's motion. And I
13 have given the Government his CV as well.

14 And the supplemental notice expanded on the general areas
15 he was going to testify about that I put in the final
16 paragraph of the July 9th notice, and expanded on that. Of
17 course, even though he had been retained, he had not -- we
18 didn't have all the Government's exhibits yet, and what he was
19 reviewing was five videotapes that the Government provided
20 notice of long ago that those were the ones that had Mr.
21 Abdulqader's performances and that the Government would be
22 using those. So he was doing a preliminary analysis based on
23 those five videotapes, even though we didn't have the exhibits
24 that were going to be in evidence. So I provided the
25 Government with that notice.

1 And around that time I had a conversation with Mr. Jacks
2 about that witness, and Mr. Jacks said, "Well, I understood
3 you weren't going to call him because he didn't think he would
4 be ready." And I said, "We would do the best we could to have
5 him ready to testify." And it has been a struggle because he
6 has started a new position and he is trying to start this with
7 not a lot of lead time.

8 Actually the Friday before trial Mr. Jacks, I don't know
9 if it was Mr. Jacks from the Government, we received one copy
10 of all -- the Defense received one copy of all the videotapes
11 that the Government intended to introduce, the video clips,
12 the ones we have been seeing. We have a package of 30 or 40
13 of those. And the first week of trial I actually asked Mr.
14 Jacks for another copy to send to my expert because, because
15 we received them right before trial, and I am not faulting
16 them, we all were exchanging exhibits, that I couldn't send
17 them out somewhere to have copies made because I wouldn't have
18 access to them while we were in trial preparing.

19 So Mr. Jacks provided those to me I think the second and
20 third week of trial. That extra copy was provided on a
21 rolling basis and I received those. And I did in fact send
22 them to Doctor McDonald. So Mr. Jacks has a known from at
23 least the first week of trial -- I mean, even if there was
24 perhaps some confusion about the initial notices, although, I
25 mean, I provided notice twice that he would be testifying, he

1 has known since at least the first week of trial that I
2 intended to call him because I requested the video clips so I
3 could send them to him.

4 So the idea that the Government only recently learned
5 that he was going to be testifying is something that I just --
6 I mean, I don't --

7 THE COURT: Have you submitted an expert report in
8 compliance with Rule 16 yet?

9 MS. CADEDDU: I have provided those two letters.

10 THE COURT: And you think those are sufficient?
11 They don't state his opinions. You give the area that he is
12 covering, but there is no opinions in there.

13 MS. CADEDDU: I understand. And certainly if the
14 Government, the Government has provided us with similar -- I
15 mean, those -- The witness notice I provided for Doctor
16 McDonald is no less detailed than any of the expert notices we
17 have been provided by the Government. It gives areas of
18 testimony and contextualizing the history of the conflict.

19 THE COURT: I know what it says. I have read the
20 letters. So you are not going to give an expert report that
21 complies with Rule 16?

22 MS. CADEDDU: If the Government feels it doesn't
23 comply with Rule 16, I can provide a supplement. That is the
24 first I have heard that the Government doesn't think it
25 complies.

1 THE COURT: Mr. Jacks, what about that issue?

2 MR. JACKS: Well, Your Honor, part of the issue is
3 the number of expert witnesses that were noticed by the
4 Defense, and which ones were going to be actually called and
5 which ones were not going to be called.

6 But regardless of the circumstances surrounding this
7 Doctor McDonald, it is not just for the Government's benefit
8 that an opinion is required. It is also for the benefit of
9 the Court so that the Court can have some kind of a notice
10 that this is the bottom line as far as what this witness
11 intends to opine about, and then the Government and the Court
12 can make a decision about the relevancy of that witness'
13 testimony.

14 And it is our position that at this stage there has still
15 not been any kind of notice provided as to what this witness
16 intends -- what his opinion will be and how it relates to the
17 issues in this case, how it is relevant, how it will help the
18 jury. And to us that is the first step that is lacking. And
19 you know, we simply need that so that -- And admittedly it is
20 late in the game, but I think a lot of these motions in limine
21 are of a nature that if they are filed several weeks prior to
22 trial, the Court is really in a position of having to wait and
23 see what evidence comes in and what issues develop before it
24 can make a ruling on these motions in limine.

25 But right now it is simply our position that given the

1 lack of any kind of report or any kind of opinion, that we
2 really are handicapped in terms of being able to respond to
3 the witness' --

4 THE COURT: And I agree that if the motion is filed
5 in advance, we may not be able to rule on it, but at least
6 everybody is on notice that you are objecting and what it is
7 that you need rather than waiting until the end. And it looks
8 like, I mean, they should have had a better expert report.

9 Those letters do not comply with Rule 16, in my view.
10 They do not state any opinions. You cover areas that they are
11 going to talk about, but they don't state any opinions. It
12 makes it hard for me to determine whether it is relevant. And
13 I may not have been able to do that if we had gotten a more
14 timely motion in limine. But, of course, they couldn't file
15 one because they didn't have the expert report. It is hard to
16 challenge relevance when you have something that broad and
17 that big. I can't tell, Frankly, whether that is relevant or
18 not.

19 So both of these experts, McDonald and Esposito, you need
20 to provide more specific -- There need to be some opinions,
21 the areas where those opinions are. Of course the rule states
22 what basis -- the basis for those opinions and whatever else
23 it states, or the qualifications. But primarily -- You have
24 attached the CVs, so that is taken care of. The witnesses
25 certainly appear to be qualified in their areas, but we don't

1 have opinions. We don't have bases. That is what puts the
2 other side on notice whether to challenge relevance, whether
3 to try to get somebody to try to meet those. They can't do
4 that with what you have. I can't rule on relevance without
5 doing that.

6 MS. HOLLANDER: Can I respond as to Doctor Esposito?
7 This was actually Ms. Moreno's expert, but she has been ill
8 and I have taken over this. She filed that letter.

9 You know, we didn't -- This was not part of the funding
10 problem. This was filed on July 9th.

11 THE COURT: Right.

12 MS. HOLLANDER: And Your Honor had an order that
13 came out, and the order which was filed on the 11th of June
14 said that the Government was to respond by July 30th and the
15 Court was not inclined to grant extensions of time to file
16 responses. The Government didn't respond at all to us. They
17 didn't say that the Government thought the report didn't
18 comply with Rule 16. And frankly, we did follow the report
19 form that the Government used in this case for its experts,
20 this being -- I mean, I assumed that the Government knew what
21 the Court wanted. This is the form actually that the experts
22 followed in the first trial, and we didn't have these kinds of
23 objections from the Government.

24 I think we actually ultimately did object to some of
25 theirs as not following the Rule 16, and the Court admitted

1 those experts.

2 But we certainly would be happy to supplement. The
3 problem is that we assumed, I know Ms. Moreno assumed and I
4 assumed, that the Government was not going to contest Doctor
5 Esposito's qualifications or relevance because we never heard
6 anything back about him or the Doctor Haykel. And up until
7 literally last week we weren't sure which one we would call,
8 because pinning these guys down on a date, as you know, is
9 very difficult. We have pinned Doctor Esposito down.

10 If the Government, you know, would like more information,
11 if Your Honor would like more information, I would be happy to
12 provide it. It is just difficult to do at the last minute is
13 all. But we can certainly do that.

14 But I just wanted to explain that the form was followed
15 that Ms. Moreno followed was the same as the ones the
16 Government used that seemed to be --

17 THE COURT: I don't know that. I know you are
18 saying that. I have not gone back and looked at what was
19 there. That is not a good enough reason. I guess that is
20 some basis for thinking that, but Rule 16 is Rule 16.

21 MS. HOLLANDER: I understand.

22 THE COURT: And it requires -- I assume all counsel
23 know what it takes. And it does state you have to give the
24 opinions and the basis for the opinions. That is the whole
25 purpose of having an expert testify. And the report and

1 notice is so the other side can know and you can attempt to
2 meet what it is that the expert is going to be expressing an
3 opinion on.

4 Mr. Jacks, let me hear from you. Are you wanting those
5 expert reports that comply with Rule 16, some specific --

6 MR. JACKS: Yes, Your Honor.

7 THE COURT: Okay. And I think that would be helpful
8 for me as well. So go ahead and get those in on both experts.
9 And when do you think you can get yours in? I know you are
10 going to need to talk to him.

11 MS. CADEDDU: I will need to talk to him. I am not
12 sure what his teaching schedule is today. Maybe by the end of
13 the day tomorrow.

14 MS. HOLLANDER: Yes.

15 MS. CADEDDU: Mr. Esposito is little more difficult.

16 MS. HOLLANDER: I think I can do it by the end of
17 the day today. I have talked to him extensively. And I think
18 that I can prepare a report that -- I mean, there is certainly
19 no question about his qualifications, so I assume -- Can I
20 leave that part --

21 THE COURT: Well, Mr. Jacks, are you satisfied with
22 the qualifications? Are you willing to rest on relevance, or
23 do you want more on that as well? And I didn't have the CVs
24 attached to the letters I have. The letters that you all are
25 sending says the CVs are attached, but they weren't attached

1 to the Government's motion so I don't have those in front of
2 me. From what is stated in there, they certainly appear to be
3 qualified individuals.

4 MR. JACKS: Your Honor, I think it just depends on
5 what they are testifying about. I mean, one kind of follows
6 the other.

7 MS. HOLLANDER: I mean, I will be happy to attach a
8 CV. I don't think that is even an issue at all.

9 THE COURT: All right. Okay.

10 MR. JACKS: Judge, let me just make one point for
11 the record.

12 The Government did file a motion in limine as to Doctor
13 Esposito and Tripp Mackintosh on August 29th, the day the
14 pretrial materials were due. We specifically filed motions in
15 limine regarding their expert testimony.

16 THE COURT: Challenging --

17 MR. JACKS: Yes, sir. And admissibility thereof.
18 So with regard to Doctor Esposito, we did file that for the
19 record.

20 One thing, Your Honor, is that if we could have some
21 better information about which experts the Defense intends to
22 call so that we can be preparing. Obviously there are several
23 of them that are on their witness list, but now that we are
24 close to the end of the Government's case, it would certainly
25 be important to us to know which ones we are talking about

1 now.

2 MS. CADEDDU: I intend to call Doctor McDonald.

3 MS. HOLLANDER: We do intend to call Doctor
4 Esposito. As I said, we intend to call him next Monday. We
5 intend to call Jonathan Benthall. And at this point we also
6 intend to call Tripp Mackintosh. Are those our only experts?
7 I am trying to remember.

8 MR. JONAS: If I may inquire some names whether or
9 not they are not forgetting anybody. Bernard Haykel.

10 MR. DRATEL: No. Doctor Esposito is going to cover
11 that.

12 MR. JONAS: Nathan Brown.

13 MR. DRATEL: No.

14 MR. JONAS: Leah Tsemel.

15 MS. HOLLANDER: We haven't made a final decision on
16 her.

17 MR. JONAS: Your Honor, If they intend to call Leah
18 Tsemel that is an issue that we need to take up with when they
19 make a decision. I believe we have raised an issue about Leah
20 Tsemel both in the last trial and prior to this trial.

21 THE COURT: Are you planning on calling her?

22 MS. HOLLANDER: She is an Israeli lawyer, Your
23 Honor, and we haven't made the final decision on her, but we
24 will tell the Government if we do plan to call her so that
25 they can object, because we know they do have objections.

1 MR. JONAS: And those objections were filed prior to
2 the last trial. We renewed them prior to this trial.
3 Mr. Cline said there is no need -- prior to this trial
4 starting, I recall Mr. Cline saying there is no need to
5 address this issue regarding her at that time because they
6 weren't sure if they were going to call her.

7 So if they do make that decision, we want to be clear for
8 the record that there is no late notice from the Defense that
9 we are objecting to her.

10 MR. DRATEL: No, we are not subjecting that. And
11 she wouldn't be one of the first witnesses anyway, even if we
12 called her.

13 MS. HOLLANDER: If we called her -- She was also a
14 fact witness. But if we are going to call her at all, we will
15 notify the Government, and she would be toward the end.

16 Our other witnesses are fact witnesses.

17 THE COURT: Okay.

18 MS. HOLLANDER: And I think the Government has
19 notice of all of them.

20 THE COURT: All right. Any other issues, then, as
21 far as experts or scheduling that we need to address?

22 MR. JONAS: Your Honor, we did file a motion in
23 limine regarding, or a *Daubert* motion, I can't recall exactly
24 how we styled it, regarding Tripp Mackintosh. It is our
25 position, based upon what they state he is going to testify

1 about, that he is not qualified to testify in this trial. He
2 is an export violation expert, not a terrorism expert.

3 THE COURT: We will take a look at that. I assume
4 you have responded to that motion.

5 MS. HOLLANDER: I would have to check, because he
6 was Mr. Cline's expert, but I am going to have to check on
7 that.

8 THE COURT: We will take a look at that. And if you
9 change your mind, let us know. We don't want to be doing a
10 lot of reading and making decisions if you are not going to
11 call these witnesses. We have enough else going on.

12 MS. HOLLANDER: Absolutely.

13 Now, Ms. Duncan has reminded me of another issue. Do you
14 want to raise that?

15 MS. DUNCAN: Your Honor, we had one translation so
16 far, and I am not sure if we have some others. We talked
17 about having witnesses sponsor those. I am not sure whether
18 the Court or the Government wants us to bring someone in, or
19 if it is sufficient --

20 THE COURT: Why don't you get with the Government,
21 let them take a look at it, and if you work that out that is
22 fine with me, obviously. If you don't, then probably you will
23 need somebody. See if you can work that out.

24 MS. HOLLANDER: The only other issue, Your Honor, if
25 I could go back to one for a minute, which the Government's

1 objections to the USAID documents, if the Government does
2 object to those I would like an opportunity to respond. Judge
3 Fish, there were two prior --

4 THE COURT: They are going to object. You don't
5 need to respond in writing. We are going to gather in the
6 morning. I said I might look at them this afternoon and give
7 you a ruling, but if I need you to respond I will
8 certainly --

9 MS. HOLLANDER: I just wanted to alert the Court
10 that Judge Fish wrote two opinions on those.

11 THE COURT: If you can find the numbers and provide
12 that to us, I will go back read them while I am reviewing the
13 objections.

14 MS. HOLLANDER: There was also lengthy discussion
15 during the examination where he admitted them.

16 THE COURT: If you can give us the ECF numbers for
17 those orders, we can take a look at those.

18 MS. HOLLANDER: I think I have those with me.

19 THE COURT: Any other issues on this?

20 MS. SHAPIRO: I wanted to tender to the Court, not
21 that you need more paper, in fact I only tabbed specific
22 pages, this was the transcript from Defendants' expert Nathan
23 Brown from last year. I just wanted the Court to be able to
24 see that on direct examination Defense counsel elicited all
25 kinds of information about recent events with the Palestinian

1 Authority. And, in fact, he based part of his expertise on
2 the fact that he was monitor of those elections in 2006.
3 There is quite a bit of discussion about it.

4 And I am also happy to provided additional points of
5 relevance about that matter. But I at least wanted the Court
6 to understand how it came into the trial.

7 MR. DRATEL: Your Honor, the Government had put in
8 stuff after December 1 over our objection, and that testimony,
9 which was obviously on the Defense case, was to meet what had
10 occurred.

11 THE COURT: Was he an expert witness?

12 MR. DRATEL: He was an expert, yes.

13 THE COURT: Do you want to bring that up to
14 Jennifer? We will take a look at that.

15 MS. CADEDDU: Your Honor, I am not sure -- I know
16 Mr. Dratel moved for a mistrial, as he was wanting to do, but
17 I don't know if we had asked for a motion to strike and then
18 an instruction to the jury. And I think for the record we
19 have to make that request as well. So I just wanted to make
20 sure that that was --

21 MR. DRATEL: And Your Honor, may I just cite to the
22 record from last year as well, August 15th, 2007, during Avi's
23 testimony. And at page 21 and 22 of that testimony that in
24 response to a question, "Who is Mahmoud Rumhi?" the answer
25 was, "One of the founders of Hamas in the West Bank and

1 Ramallah. And I remember him in general saying that Hamas won
2 the election because of its charity branch, social branch. He
3 was not the only one who said that."

4 So obviously that came in well before Nathan Brown. And
5 we objected -- part of our motion in limine prior to the case,
6 was to keep out everything after December 4th, 2001.

7 Thank you.

8 MS. SHAPIRO: I will just say two things. One that
9 points out the relevance of the information is that part of
10 knowing the people on these committees and their affiliation
11 with Hamas comes from a variety of sources of information, and
12 one is that Hamas sometimes comes out itself and identifies
13 people as being one of their own. And one of the ways they
14 did that is when people ran on the Hamas ticket in the
15 elections.

16 So it is relevant for an expert looking at an individual
17 to know, okay, in 2006 this person is running on the Hamas
18 ticket. They probably didn't become Hamas the week before.
19 And you look at the totality of the evidence.

20 In addition, the civil conflict that broke out in Gaza at
21 the same time in the West Bank, there were charity committees
22 at issue in this case. The Nablus zakat committee was
23 actually attacked, physically attacked by Fatah supporters.
24 Obviously it was attacked because they viewed it, the public
25 viewed it as a Hamas institution.

1 And again, it is relevant to an expert to see that when
2 you have the Fatah faction attacking what they believe is a
3 Hamam institution, that is relevant to the communities'
4 understanding that that is a Hamas institution.

5 Probably, again, logically it didn't become a Hamas
6 institution the day before. This is a time progression, and
7 he will testify that these committees were Hamas beginning
8 around in 1994 solidly, and then all the way up to the action
9 that the PA took recently.

10 Doctor Brown didn't respond to that so much. He went and
11 talked about events that went two weeks prior to his
12 testimony. He specifically said that the PA had taken an
13 action, it might have been days before, that had closed down a
14 number of committees in the West Bank, and then he
15 specifically said, and none of the zakat committees were on
16 that list, and, therefore, in his opinion that means that the
17 PA doesn't view them as Hamas committees. In fact, now they
18 have been closed down and reorganized, so all of that backdrop
19 is very relevant to understanding the nature of these
20 committees and the understanding of the people in those
21 communities as to whether they are Hamas.

22 MR. DRATEL: The only thing I would say, Your Honor,
23 is Your Honor identified yesterday what the problem was, and I
24 think that problem is still there in terms of your colloquy
25 with the Government about how far it went and how far afield

1 it went. We are not talking about something that happened
2 yesterday. We are talking about a six-year hiatus.

3 THE COURT: Is it Doctor Brown that testified the
4 last time?

5 MR. DRATEL: Yes.

6 THE COURT: Are you are intending on bringing him
7 again this time?

8 MR. DRATEL: No. We have a different witness.

9 THE COURT: To testify on the same area?

10 MR. DRATEL: About zakat committees. He is going to
11 talk about zakat committees.

12 THE COURT: Is he going to take it to the present.

13 MR. DRATEL: If this is in here.

14 THE COURT: What if it isn't in there?

15 MR. DRATEL: I have to go look at what is already in
16 the record in the sense that it -- He wasn't planning on
17 talking about civil war, and he wasn't planning on talking
18 about the reasons why Hamas won the election. But they have
19 put in as part -- And I think Agent Burns testified about
20 people running on a Hamas ticket as well. So in terms of what
21 that --

22 THE COURT: But the elections and running on a Hamas
23 ticket and who controls, that doesn't go to the issue of
24 necessarily who controls the zakat committees.

25 MR. DRATEL: But the Government put that in for that

1 reason.

2 THE COURT: I understand. But I am saying I don't
3 know why we need to get into too far into that.

4 MR. DRATEL: It is not going to be too far into it,
5 but just the identity of certain people and people who may
6 have run on the ticket and whether or not they are identified
7 with Hamas or; not about the election.

8 THE COURT: Whether certain individuals are Hamas or
9 not?

10 MR. DRATEL: That is correct.

11 THE COURT: Individuals named in the trial.

12 MR. DRATEL: Right. Right. That are associated
13 with the zakat committees and what that means if they ran on a
14 ticket. And it wasn't called a Hamas ticket. It was called
15 Change and Reform. It included a variety of different people,
16 including Christians, on the ticket. So it is a lot more --

17 THE COURT: He is going to address those issues.

18 MR. DRATEL: In the context of those specific
19 people, yes. And, you know, I mean, they have opened up this
20 whole issue --

21 THE COURT: It sounds like you were planning on
22 going into it in any event. You have got an expert lined up
23 to talk about this. It just sounds like you were planning on
24 going into this as part of showing that these people are not
25 Hamas; that the Government has been trying to show they were

1 Hamas, with or without this discussion we had yesterday. I am
2 just still --

3 MS. HOLLANDER: I think we are talking about
4 different people. I mean, I am listening to you, Your Honor,
5 and I am listening to Mr. Dratel, and I think -- Maybe I am
6 wrong, but you are talking I believe about people who Avi is
7 identifying as being Hamas, and Mr. Dratel --

8 MR. DRATEL: I will be talking about a variety of
9 people; people on these zakat committees and people --

10 THE COURT: That have been identified throughout the
11 case.

12 MR. DRATEL: That is right. They were identified by
13 Agent Burns in her charts. He is probably going to talk about
14 them tomorrow. You know, and they are fair game in that
15 regard both ways. I mean, if they are going to put in saying
16 he is a Hamas person, there are indications that he is not or
17 that it doesn't matter in the context of the committee, that
18 is what our expert will be talking about.

19 MS. HOLLANDER: Your Honor, also Mr. Abington, if
20 the Government had not put this information in, then his
21 testimony would just cover the period of time that Holy Land
22 was open, actually '93 to '97 or '99 when he was there. But
23 the fact that the Government has put this in and he has -- Mr.
24 Avi has stated his opinion about why Hamas won, I mean, there
25 is a big difference of opinion there. And that is --

1 THE COURT: I am just wondering why any of that is
2 relevant to this case. I am hearing all this, but the issues
3 that the jury is going to have to decide -- Did these
4 Defendants give money to the zakat committees knowing that
5 they were controlled and run by Hamas, that is the issue.

6 MS. CADEDDU: And we don't think it is relevant. I
7 just want to make --

8 MR. DRATEL: But it is out there now.

9 THE COURT: But you are still having an expert lined
10 up to come in and talk about things that have happened after
11 the fact -- Hold on. Because they are saying they were Hamas
12 back when the money was being given. And even before that the
13 Government has evidence that these individuals were connected
14 with Hamas, and then you are wanting to get into that they ran
15 in 2006 and they weren't on the Hamas ticket, or whatever it
16 is you are wanting to do, you are going along the same --

17 MR. DRATEL: Agent Burns has already testified to
18 the election and people running on the Hamas ticket, and that
19 is what it was designed to -- What I was objecting to
20 yesterday was the context that Avi put it in, which is
21 essentially to try to telegraph to the jury that the Holy Land
22 Foundation is responsible for Hamas winning the election and
23 for a civil war that followed, and that to me is beyond 403.
24 And I don't think an instruction or a striking can do it. I
25 think it is grounds for a mistrial.

1 THE COURT: I think it probably can. And I don't
2 think that is where that testimony was going. This is in '06
3 and '07, and so Holy Land had been closed down a while back.
4 He was talking more about the conflict between Hamas and
5 Fatah. I didn't understand that as somehow Holy Land is
6 responsible for any of that, the way you are making it out.

7 And, of course, I have still been having some concerns
8 with the relevance. Do you want to address that?

9 MR. JACKS: Your Honor, yes.

10 The object of this conspiracy was to support Hamas, and
11 when the Holy Land Foundation was shut down December 4th of
12 2001, the conspiracy did not end. The object or the desire or
13 the goal to support Hamas --

14 THE COURT: But the conspiracy that you have alleged
15 in the indictment involves the funding of the zakat committees
16 through Holy Land.

17 MR. JACKS: That is one aspect of it, yes, Your
18 Honor. And that may be a conspiracy within a conspiracy.

19 THE COURT: Is that not the conspiracy you have
20 alleged?

21 MR. JACKS: It is, Your Honor. But it is also --
22 There is also evidence of the overarching conspiracy, if you
23 will, to support Hamas. And I guess this case is different,
24 say, from a drug case in the sense that once the drug
25 defendants were arrested, that that was the end of the

1 conspiracy. It was not, because there is other people, other
2 conspirators out there still working toward this goal. And --

3 THE COURT: But doesn't that start getting reduced
4 in relevance as it is other conspirators and not the
5 Defendants, and Holy Land has been closed down? Aren't we
6 just getting further and further away?

7 I mean, even if that is 100 percent true, how is that
8 really going to show -- The charges against these Defendants
9 are that they funded Hamas through these -- by giving money to
10 these zakat committees. That is how they were supporting
11 Hamas. How does that go to show whether that happened or not?

12 MR. JACKS: And part of our burden is to show that
13 those zakat committees were controlled by Hamas.

14 THE COURT: Right. During the relevant time frames.

15 MR. JACKS: I understand. But just as the evidence
16 prior to the Hamas being designated is probative of who
17 controlled those committees, likewise time evidence later can
18 be probative --

19 THE COURT: And I agree to an extent. That is the
20 problem that I am having is we start getting into '06
21 elections and '07. But go ahead. I keep interrupting. Let
22 me hear your theory.

23 MR. JACKS: Well, as I said and as Ms. Shapiro
24 pointed out, these things don't just happen overnight, so the
25 argument is if they were Hamas in 1999 and 2001, they didn't

1 stop being Hamas. There is evidence that they were continuing
2 to be controlled by Hamas, and there is evidence that other
3 people took action because they were controlled by Hamas, and
4 that is the evidence that we seek to introduce.

5 THE COURT: And the action is what was -- the action
6 taken by the Palestinian Authority?

7 MR. JACKS: Yes, sir. And that is the PA, or
8 actually Fatah I guess you could say, the other dominant
9 party, took action to --

10 THE COURT: And that is closing these committees
11 down?

12 MR. JACKS: Closing these committees and removing
13 people that were in there.

14 THE COURT: Okay. And when are you saying that this
15 happened?

16 MR. JACKS: It has happened in 2007, Your Honor.

17 THE COURT: Okay.

18 MR. JACKS: And part of the relevance of it is to
19 also rebut the Defense argument that they have made a point of
20 saying that Fatah, or the PA at the time which was controlled
21 by Fatah, was the bitter enemy of Hamas. These documents from
22 several of these zakat committees bear the PA logo, so the
23 argument or the implication is that if the PA has licensed
24 these organizations they must not be Hamas, and that is not
25 the whole story. So it is to rebut that --

1 THE COURT: This closing them down in '07 and '08,
2 then, goes to rebut that?

3 MR. JACKS: Yes. And that is -- And we intend to
4 present evidence to better explain the relationship between
5 the PA, Fatah, and Hamas.

6 THE COURT: And this is through Avi?

7 MR. JACKS: Yes. And he has already testified about
8 -- They raised the point, or they did last year, that the
9 Israeli authorities licensed these zakat committees and
10 permitted them to operate, and he has already testified about
11 why the Israeli authorities did that to explain that part of
12 their argument.

13 So this later evidence is still probative of this
14 relationship and to show the evidence that supports the
15 Government's argument that these committees were Hamas and
16 they continue to be Hamas up until the time that in I belief
17 it was December of 2007 the PA basically reorganized all of
18 it. They took away all of these zakat committees and said
19 there is going to be one for each district, and it will be
20 non-political, and they removed people from them. And that is
21 probative of the fact that the PA regarded these committees as
22 Hamas.

23 And then he further testified that Hamas objected loudly
24 and violently and claimed, "This is an attack on us." So it
25 is evidence from Hamas itself corroborating that these were

1 their committees because of the way they reacted to their
2 closure. And that is what this evidence is intended to show.

3 I yield to my colleague from Washington.

4 MR. JONAS: Your Honor, this fits in also with what
5 Avi was saying about the delicate balance between the PA and
6 Hammas. And he referenced the Middle East Affairs Journal.
7 Once there was that civil war between Hamas and the PA, that
8 delicate balance no longer applies, and the PA basically took
9 the position of, "We are now going to go after Hamas." And
10 that is when they shut down these organizations in 2007. So
11 it all feeds into that, and it all stems from the Defense that
12 Mr. Jacks said, saying, "The PA is licensing these committees.
13 They must be okay."

14 MS. SHAPIRO: And just finally, Your Honor, the
15 Defense experts, and I am sure you will hear this argument in
16 their case that these are just charity committees. They are
17 non-political. They are just giving out aid to the poor and
18 the needy. So evidence that there are Hamas people who are in
19 these committees, evidence that the PA viewed them as Hamas,
20 that the Palestinian population viewed them as Hamas, even if
21 it is after the date that Holy Land closed, those committees
22 are still up and operating. And it is probative of the
23 character of those committees, and we believe they are very
24 relevant to meet their arguments.

25 MR. DRATEL: I don't need to repeat myself, Your

1 Honor.

2 MR. WESTFALL: It sounded to me like, Your Honor,
3 and I might be wrong, that you and Mr. Dratel were kind of
4 talking past each other a little bit. We don't have an expert
5 that is just brought in to talk about these --

6 THE COURT: I didn't say just, but you were planning
7 on addressing that issue, it sounds like.

8 MR. WESTFALL: Well, we had to address it last year
9 certainly, yeah.

10 THE COURT: But you had an expert already lined up.

11 MR. WESTFALL: We did, who was capable of doing
12 that. But the 2007 events, Your Honor, those zakats were
13 closed down while we were in trial, and so, you know, they are
14 trying to use that to prove their case. We are doing what we
15 need to do to defend ourselves.

16 And I can't imagine how we opened the door to that. I
17 mean, there is always some argument that we opened the door to
18 this or that. That is just kind of the nature of the case,
19 Your Honor. I guess we all just have to try our case. It
20 doesn't make sense.

21 THE COURT: I understand what you are saying. I
22 mean, I understand. And normally I like to let the parties
23 try their case, but I also like to keep it within the bounds
24 of relevance. I think we are pushing the bounds of relevance.

25 I understand your relevance arguments. I haven't made

1 any decisions, but I just wanted to understand, you know,
2 because we didn't get into that much depth, detail yesterday
3 in terms of your arguments as to why this was relevant and why
4 you thought you needed to get into it.

5 MR. DRATEL: Just to clarify based on what Mr.
6 Westfall said, the expert we have, Mr. Benthall is going to
7 talk about the entire range of this. He has studied the
8 history of them. He was there on the ground in the '90s in
9 the West Bank, so that other part is just a small tiny piece
10 really.

11 THE COURT: All right.

12 MS. SHAPIRO: Your Honor, I just wanted to let you
13 know, just so you know what is coming with Avi's testimony,
14 essentially that discussion of sort of the history of the
15 committees was background, and now we are going to get into
16 the specific committees and I am going to focus his attention
17 and his opinion will be on the period of 1995 to 2001.

18 But as an expert he evaluates lots of different kinds of
19 evidence. One piece of information and one criteria that he
20 applies is how the PA has treated these committees over the
21 years. So he will talk about the different people in the
22 committee, and he will bring multiple sources of information
23 to bear, including what they were doing in the early '90s,
24 including the mid '90s, and also if, for example, they
25 identified themselves as Hamas by running on the Hamas ticket,

1 that will be relevant to his overall opinion.

2 THE COURT: And then he is going to discuss the
3 reorganizations, then, of those particular --

4 MS. SHAPIRO: He is not.

5 THE COURT: That is done?

6 MS. SHAPIRO: Yes. That was background to
7 understand and to meet the argument that the fact that the PA
8 did nothing --

9 THE COURT: Right. What testimony, then, respecting
10 these 2006 elections and then the aftermath, what else is left
11 rather than self-identification by running on the Hamas
12 ticket?

13 MS. SHAPIRO: Nothing. I mean, that was really
14 intended to be simply a background to understand the history
15 of the context so that when the argument comes back that the
16 Israelis licensed them and the PA didn't do anything about
17 them, and they have never been closed even today--I guess they
18 can't say that now, but last year--so that there is some
19 context to understand these committees.

20 Now what he is going to do is he is going to apply a
21 number of criteria that he looks at when looking at the
22 composition of these committee, he is going to discuss the
23 individuals in the committee, and he is going to refer to
24 different pieces of evidence that identify those individuals
25 and talk about these individuals as Hamas when they came into

1 the committee, and that the committee, based on the
2 individuals, items that were seized from the committee, public
3 sources, media reports, and things like that, that all of that
4 information together tells him, in his opinion, that during
5 the time period of the indictment, '95 to '01, that those
6 committees were controlled by Hamas.

7 He is not going to get into anymore discussion -- And the
8 conflict was only, again, I think -- In the context of the
9 Nablus zakat committee it was relevant to him again that Fatah
10 went out and actually physically attacked this committee,
11 thereby identifying -- the community identified that committee
12 as Hamas. That was relevant to him.

13 Other than that, and other than the fact that some of
14 these people self-identified by running on a Hamas ticket,
15 that is all we have.

16 THE COURT: Okay.

17 MR. WESTFALL: Can I just say one thing, Your Honor?

18 THE COURT: Yes.

19 MR. WESTFALL: Along with so many other kind of
20 unique issues in this case, this whole phrase Hamas ticket is
21 even an issue, whether or not it was the, quote unquote, Hamas
22 ticket. I mean, it was not called the Hamas ticket. And
23 there are strong differences of opinion as to whether or not
24 it was a Hamas ticket. So that is just -- You know, these
25 issues like, that that -- This isn't a drug case, clearly. I

1 mean, so there is a lot more at dispute here than kind of
2 meets the eye at first.

3 MS. SHAPIRO: Your Honor, whether or not -- The
4 ticket was called the Change and Reform Party, and there were
5 people who ran on that. And not every person was Hamas, but
6 people identified their party. So when somebody ran on the
7 Change and Reform ticket and ran from Hamas, then they were
8 Hamas, so it is not a big secret. And it was widely viewed as
9 the Hamas ticket, and Hamas took control of parliament as a
10 result of the victory in that election.

11 THE COURT: That was in Gaza?

12 MS. SHAPIRO: Well, this was the PA parliamentary
13 elections. It didn't evolve into sort of split Government's
14 until this civil conflict in 2007.

15 THE COURT: Okay.

16 MR. DRATEL: That is just an evidentiary issue.
17 They can say it, but it may not be the truth.

18 THE COURT: I understand it is disputed. You are
19 entitled to put in your opinions on that.

20 MR. JACKS: And it was an evidentiary issue in the
21 last trial, and I venture to say it didn't add 20 minutes to
22 the trial.

23 THE COURT: Okay. Anything else we need to address
24 along those lines.

25 We have a couple of other issues I guess we can get off

1 the record here for a minute.

2 (Discussion held of the record.)

3 THE COURT: All right. With respect to the
4 discovery issue, and the Court had an ex parte conference with
5 Defense counsel last Thursday, which would have been October
6 the 23rd, I believe, after court recessed at the end of the
7 day, specifically to get their understanding and idea from
8 them as to what it was they were looking for before I looked
9 at some classified material.

10 I looked through that material and have determined that
11 there is not anything in there that should be disclosed to
12 Defense counsel, to the Defendants.

13 Anything else that anybody wanted to add to that?

14 MS. HOLLANDER: I can't think of anything else.

15 MR. DRATEL: No, Your Honor.

16 THE COURT: All right.

17 MS. HOLLANDER: What time tomorrow?

18 THE COURT: Be here at 8:30. We will address your
19 objections and the 106 issue that Ms. Moreno raised, and if
20 there is anything else I need to add on this relevance issue
21 that we have been discussing with the elections and the
22 aftermath, we will discuss that at 8:30 in the morning.

23 Are you anticipating having a lot of objections to these
24 exhibits identified?

25 MR. JONAS: No, sir. There is only roughly ten or

1 so. I didn't count. There are not that many.

2 MS. HOLLANDER: They are all the same kind of
3 objection.

4 MR. JONAS: If I can ask a question of Defense
5 counsel, is that all of the exhibits that collectively you all
6 plan on showing through Avi?

7 MS. HOLLANDER: Those were just mine.

8 MR. JONAS: So that is the only ones that we have
9 noticed, Your Honor.

10 THE COURT: Anybody else intending to offer any?

11 MR. DRATEL: There might be one.

12 THE COURT: If you will get that to the Government.

13 MR. DRATEL: We will get that to them today.

14 THE COURT: In fact, why don't you try to get them
15 to them in the afternoon.

16 Ms. Cadeddu, do you expect any?

17 MS. CADEDU: Your Honor, I don't believe I have
18 any.

19 THE COURT: Mr. Westfall?

20 MR. WESTFALL: No.

21 THE COURT: That way I can get the objections this
22 afternoon, and I can have a chance to look at them for in the
23 morning.

24 MS. HOLLANDER: Actually I am reviewing one more,
25 but I was in the middle of reviewing it, so if I am going to

1 add one more I will give it to you.

2 THE COURT: Let's here at 8:45 in the morning.

3 THE COURT: You made your additional motions, so I
4 will give you a ruling. Just remind me in the morning and I
5 will give you a ruling on that.

6 (End of day.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts

06/07/2009

10 _____DATE_____
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12 FEDERAL OFFICIAL COURT REPORTER
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